2001

Daniel C. McKeon and Lisa Mckeon v. Kenneth Crump and Amy S. Crump : Brief of Appellant

Utah Court of Appeals

Nelson T. Abbot; Counsel for Appellants.
Richard D. Bradford; Counsel for Appellees.

IN THE COURT OF APPEALS
STATE OF UTAH

DANIEL C. McKEON and LISA McKEON, Plaintiff. Appellants and Cross-Appellees. vs. KENNETH CRUMP and AMY S. CRUMP, Defendants, Appellees and Cross-Appellants.	Appellate Court No.: 20010121-CA Trial Court No.: 990404250

Interlocutory Appeal from the Fourth Judicial District Court
for Utah County

Judge Fred Howard

Rule 29(b) Priority Classification: 15

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the Fourth District Judicial District Court, in and for Utah County. R. 440.[1]

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issues presented to the Court of Appeals are:

a) Whether the trial court was correct in determining that the failure of the plaintiffs to return the earnest money prior to filing suit required the case to be dismissed. Standard of review is correctness because that is a legal issue. Palmer v. Hayes, 892 P.2d 1059 (Utah. Ct. App 1995). This issue was preserved for appeal at R.516, page 19

b) Whether the trial court was correct in finding that the defense of failure to return the earnest money prior to filing suit could not be waived by the defendants. Standard of review is correctness, Palmer v. Hayes, 892 P.2d 1059 (Utah. Ct. App 1995). All factual inferences must be drawn in favor of the plaintiffs, Martin v. Stevens, 243 P.2d 747 (Utah 1952), however, the findings of fact made by the trial judge must be given great weight, Southern Title Guar. Co., v. Bethers, 761 P.2d 951 (Utah Ct. App. 1988). This issue was preserved for appeal at R.516, page 20.

b) Whether the trial court was correct in dismissing the case with prejudice. Standard of review is correctness, Valley Colour, Inc. v. Beuchert Builders, Inc., 944 P.2d 361 (Utah 1997). These issues were preserved for appeal at R.428.

RELEVANT STATUTORY PROVISIONS

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[1] Citations to the numbered pages of the record on appeal are in the form "R. ____."

Rule 8, U.R.C.P.

Rule 12, U.R.C.P.

STATEMENT OF THE CASE

1. This is a suit specific performance and damages under a Real Estate Purchase Contract. R. 471.

2. On, or about, October 25, 1999, the parties entered into a Real Estate Purchase Contract for the sale of Plaintiff's home to Defendants. Incident to the contract, Defendants paid Plaintiff's $2,500.00 Earnest Money. R. 471.

3. Defendants never purchased Plaintiff's home. R. 470.

4. On December 2, 1999, Plaintiffs filed this lawsuit against Defendants. Plaintiffs did not return the Earnest Money to Defendants prior to filing suit or pursuing any other remedy. R. 470.

5. On December 6, 1999, Defendants gave notice that they would not go through with the purchase and demanded return of the Earnest Money. R. 470.

6. On March 6, 2000, Defendants filed an answer. Defendants did not raise the failure to return the Earnest Money as an affirmative defense in their answer. R. 470.

7. On April 18, 2000, counsel for the parties entered into a stipulation. Part of the stipulation was that Defendants would waive all objections to the timeliness of the return of the Earnest Money. R. 470.

8. On May 19, 2000, Plaintiffs returned the Earnest Money, twenty-five hundred dollars (2,500), to Defendants and Defendants accepted the money. R. 470.

9. Plaintiffs returned the Earnest Money in an attempt to revive or preserve their claim for specific performance. R. 470.

10. The Real Estate Purchase Contract contains the following provision providing for return of the Earnest Money: "If Buyer defaults. Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this contract or pursue other remedies available at law." Paragraph 16. R. 470.

11. Plaintiffs presented their case at trial on June 6, 2000, and August 29, 2000. Plaintiffs rested their case on August 29, 2000. R. 470.

13. At the close of Plaintiffs case, Defendants made a motion to dismiss based upon Plaintiffs' failure to return Defendants' Earnest Money before filing suit. R. 470.

14. The defendants intentionally waited to raise the defense so that they could ensure a dismissal with prejudice. Docketing statement of defendants filed with the Appellate Court.

SUMMARY OF ARGUMENT

This case should not have been dismissed for failure to return the earnest money. Neither case law, nor the contract itself require the earnest money to be returned prior to filing the lawsuit. In fact, public policy demands that a seller be allowed to return the earnest money after filing suit and before entry of judgment.

Even if the sellers should have returned the earnest money prior to filing suit the case should not have been dismissed for failure to do so. The purchasers failed to raise the defense in their answer, they stipulated to waive it and they accepted return of the

earnest money. Because the defense of failure to return the earnest money is an affirmative defense and is nothing more than a rule of procedure, it can be and was waived in this case.

The trial court should not have dismissed this case with prejudice. The trial court's decision was based upon a technical rule of procedure and thus should have been dismissed without prejudice.

ARGUMENT

I.

FAILURE TO RETURN THE EARNEST MONEY PRIOR TO FILING SUIT DOES NOT REQUIRE DISMISSAL

A. THE PRIOR CASES DO NOT REQUIRE A RETURN OF THE EARNEST MONEY PRIOR TO FILING SUIT.

In a long line of cases, the Appellate courts of this state have held that they will enforce a contractual provision in a Real Estate Purchase Contract requiring a seller to return earnest money prior to obtaining specific performance. Palmer v. Hayes, 892 P.2d 1059 (Utah Ct. App. 1995); Dowding v. Land Funding Limited, 555 P.2d 957 (Utah 1976); Close v. Blumenthal, 354 P.2d 856 (Utah 1960); McMullin v. Shimmin, 349 P.2d 720 (Utah 1960); Andreason v. Hansen, 335 P.2d 404 (Utah 1959).

In Andreason, a lawyer was selling real property. When the buyer failed to consummate the purchase, the plaintiff attempted to obtain a money judgment on a Real

Estate Purchase contract. The court expressed concerns regarding the lawyers advantaged position, the small type used in the contract itself and other deceptive practices of the seller. The court concluded by holding that because the seller's "whole case is itself based upon an attempt to apply a fine print clause in a contract against the defendants, when there is no indication that they understood the situation, and every reasonable inference is to the contrary," the trial court should have found a technicality in the contract to allow the buyers to escape liability. That technicality was the failure of the seller to return the earnest money. Andreason at 409.

In McMullin, the court stated that the seller "never has returned or offered to return the [earnest money]." McMullin at 721. The Court then states that the trial court dismissed the case "for failure to return or offer to return the earnest money prior to suit." McMullin at 721. The Court did not address what would happen if the earnest money had been returned after filing suit.

Similarly, in the Close case, the court held that a seller must elect his remedy and "act consistently therewith." Close at 857. Close did not discuss the situation we are faced with here, namely, what happens if the seller returns the earnest money after filing suit but before the case is dismissed.

In Dowding, the seller never returned or offered to return the earnest money to the buyer. Instead, the seller deposited it into court. The Court held that did not constitute a return of the earnest money and thus the case was properly dismissed.

Most recently, the Palmer case involved a situation where the earnest money was held in escrow during the entire case. The Court held that the seller could have instructed the escrow agent to return the money and the seller's failure to do so constituted a failure to return the earnest money. While a careful reading of the facts of the case seem to indicate that the earnest money had not been returned at any time, the case does contain dicta stating that the seller "had an affirmative duty to release their interest in the deposit money to the [purchasers] before they filed their suit for damages." Palmer at 1062.

Thus, a careful review of the Utah cases regarding return of earnest money, does admittedly show some dicta that would lead one to believe that the earnest money must be returned prior to filing suit. The actual facts of the cases, however, seem to show that the earnest money was never returned or tendered even after suit was filed. Thus, the issue presented in this case is one of first impression. Can a seller return the earnest money after filing suit?

B. THE CONTRACTUAL LANGUAGE DOES NOT REQUIRE A RETURN OF THE EARNEST MONEY PRIOR TO FILING SUIT.

The contractual language at issue in this case reads, "If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this contract or pursue other remedies available at law." R. 54. Thus, a buyer presented with this contract would clearly understand that if he or she signed the contract, he or she would be risking more than the earnest money. Instead,

the buyer would be risking either the earnest money or being forced to purchase the property, depending on what the seller chose to do. Public policy would favor allowing the seller to make that decision since the parties to the contracted expected the seller to do so.

The next question is, when does the seller make that decision. The contractual language does not require return of the earnest money before filing suit. The contractual language contains two clauses connected by the word "and." The first clause is "return it" while the second clause is "sue buyer to specifically enforce this contract or pursue other remedies available at law." In this context, the word "and" states two conditions that must be satisfied should the second option be chosen by the seller. The contract does not mandate the order in which the two clauses must occur. For example, the phrases, "you must take trigonometry and geometry before calculus" is equivalent to the phrase, "you must take geometry and trigonometry before calculus." The mere use of the word "and" does not indicate that the events did or must occur in a particular order.

In this case, the contract does not contain the word "then" or "after" or other similar language. Instead, it only contains the use of the word "and." Thus, the plain language of the contract does not require one event to occur before the other. Instead, it only requires both events to occur sometime before the seller actually obtains the specific performance.

Further, the contract contains the word "sue." If that word is to be interpreted as argued by the defendants, it should have used the word "file" or "commence." By using the word sue, the contract means that the earnest money must be returned before judgment.

C. PUBLIC POLICY FAVORS ALLOWING THIS CASE TO GO FORWARD ON THE MERITS.

Public policy does not support a strict rule requiring return of the earnest money prior to the instant the complaint is filed at the court house. In our legal system, cases often take months or even years to come to trial. During that time, the financial or other condition of the parties may change, thus necessitating a change in the relief sought. For this, and other reasons, our laws have been designed to give parties to litigation some flexibility. For example, parties are allowed to plead alternative and inconsistent causes of action. Another example may be a plaintiff who files a complaint and then amends it prior to serving the adverse party. In fact, a plaintiff may actually file a complaint, dismiss it without prejudice and refile it.

Public policy also favors allowing parties to enforce valid contracts. In this case, the buyers agreed to purchase the home. Public policy favors forcing the defendants to live up to their contractual obligations.

For the reasons stated above, public policy must also favor allowing a party to return earnest money after the complaint is filed. That is especially true in a case like this where the defendants waived the defense, as will be discussed below.

A purchaser might argue that it is unfair to allow the seller to proceed with a lawsuit while holding the earnest money. The long line of cases cited above make it clear that Utah courts will not allow a seller to do so. However, under our legal system, a purchaser is not without remedy. A purchaser may raise an affirmative defense in his answer, he may write a letter requesting return of the earnest money, or he may file a motion to dismiss. Under these circumstances, the seller would then clearly understand his legal obligations and would be able to exercise a conscious and knowing decision. On the other hand, if this court creates a hard and fast rule requiring return of the earnest money prior to filing suit, many cases will end up being thrown out on nothing more than a technicality. In reply, a purchaser might argue that once this court rules, the law will be established one way or the other and it won't make any difference. If this court adopts the position espoused by the defendants, however, this court will simply create a malpractice trap for attorneys and an unpleasant surprise for pro se plaintiffs. Our courts should not sanction that type of approach to these cases.

This case should be given the same treatment as other election of remedy cases where the plaintiff is allowed to make the election after filing suit. For example, in Uniform Real Estate Purchase Contract cases, the seller has been allowed to file

inconsistent pleadings and then make the election after the defendant files a motion to dismiss for failing to make the election. Midvale Motors, Inc. v. Saunders, 432 P.2d 37, 39 (Utah 1967) ("[buyers] had a right during the course of the litigation to demand such an election but not to make such an election on behalf of Midvale."); Rogers v. United Western Minerals Company, 326 P.2d 1019 (Utah 1958) (election made at pretrial was timely).

Thus, this court should hold that a seller of real property may return the earnest money after filing suit but must return it when the defendant requests the plaintiff to make an election of remedies.

II.

THE DEFENSE OF FAILURE TO RETURN THE EARNEST MONEY CAN BE WAIVED

The trial court found that the defendants had waived the defense of failure to return the earnest money both by failing to raise it in a timely manner, by stipulation and by accepting return of the earnest money. The judge then held, however, that the defense could not be waived as a matter of law. That ruling is incorrect.

U.R.C.P. 8 required the defendants to raise the defense of failure to return the earnest money as an affirmative defense in their answer. U.R.C.P. 12(h) states that affirmative defenses which are not timely raised are waived. Because the defendants failed to raise the defense in their answer, they waived it.

Further. the defendants expressly waived the defense by stipulation. Finally, by accepting return of the earnest money, they waived the defense.

The doctrine of election of remedies is a "technical rule of procedure . . . ." Angelos v. First Interstate Bank of Utah, 671 P.2d 772, 778 (Utah 1983) (case dealing with an election of remedies between a bank and the person who forged several checks). In Palmer v. Hayes, 892 P.2d 1059 (Utah App. 1995), the plaintiff attempted to distinguish earnest money REPC cases from other election of remedies cases. The court held that "the Andreasen line of cases [return of earnest money/election of remedy line of cases] does not conflict with Angelos. The Andreasen line does not dispute the fact that election of remedies is a procedural rule; the cases simply define the procedure for electing remedies." Palmer at 1062. Thus, defense of failure to return earnest money is a technical rule of procedure and is an affirmative defense that can be waived. Costello v. Kasteler, 324 P.2 772 (Utah 1958).

Thus, the trial court was incorrect in holding that the affirmative defense of failure to return the earnest money could not be waived.

III.

THE TRIAL COURT ERRED WHEN IT DISMISSED THE CASE WITH PREJUDICE

As stated above, the case should not have been dismissed. In the alternative, however, if this court finds that it should have been dismissed, the case should have been dismissed without prejudice.

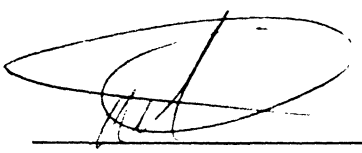
In Bunting Tractor Co., Inc. v. Emmett D. Ford Contractors, Inc., 272 P.2d 191 (Utah 1954); Kemper v. Clarite Battery, Inc., 272 P.2d 194 (Utah 1954), the plaintiff was required by rule to post a bond within 30 days of demand by the defendant. The plaintiff failed to post the bond within 30 days as required by rule. If the plaintiff failed to comply, the rule stated that the court "shall dismiss the action . . . ." Bunting at 277. The plaintiff did post the bond prior to the motion to dismiss. The court dismissed the case with prejudice. On appeal, the Supreme Court held that it is "the duty of the court to make such order, not inconsistent with law, as will effectuate justice." Bunting at 277. The court went on to state that under Utah law that "deviation from form and procedure shall not work a forfeiture of substantive rights in the absence of prejudice to the opposing party." Bunting at 277. Finally, the Court stated that it the "purpose of the courts to afford litigants every reasonable opportunity to be heard on the merits of their cases." Bunting at 277. For these reasons, the trial court was overruled and the dismissal was made without prejudice.

The case at bar is very similar. This case was dismissed because the plaintiffs failed to return the earnest money prior to filing suit. The trial court did not make a decision on the merits. Further, the earnest money had been returned prior to the filing of the motion to dismiss. For these reasons, if the trial court was proper in dismissing the case, it should have dismissed it without prejudice.

CONCLUSION

For the reasons stated above, the appellants (plaintiffs) respectfully request this Court to overturn the order of the trial court dated November 25, 2000 and to remand this case to the trial court with instructions that the trial court deny the motion to dismiss and hear this case on its merits. Further, the appellants request their costs on appeal.

DATED this 24th day of May, 2001.

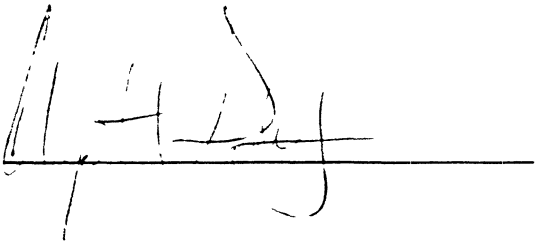


Nelson Abbott

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant was duly served upon the following by placing said copy in the United States mail, postage prepaid, on this 25 day of May, 2001, addressed as follows:

Richard D. Bradford
389 North University Ave.
Provo, Utah 84601



ADDENDUM A
RULE 12, U.R.C.P.

Rule 12. Defenses and objections.

(a) *When presented.* A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) *How presented.* Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) *Motion for judgment on the pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) *Preliminary hearings.* The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) *Motion for more definite statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) *Motion to strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of defenses.* A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) *Waiver of defenses.* A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) *Pleading after denial of a motion.* The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) *Security for costs of a nonresident plaintiff.* When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) *Effect of failure to file undertaking.* If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.
(Amended effective Sept. 4, 1985; April 1, 1990.)

Compiler's Notes. — This rule is similar to Rule 12, F.R.C.P.

Cross-References. — Motions generally, U.R.C.P. 7.

NOTES TO DECISIONS

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——Amended answer.

ADDENDUM B
RULE 8, U.R.C.P.

the prayer does not limit the relief which the court may grant. Behrens v. Raleigh Hills Hosp., 675 P.2d 1179 (Utah 1983).

—New trial.

——Particularization.

Only purpose for requiring particularization of grounds for motion for new trial is to inform court and other party of theories upon which new trial is sought, where defendant filed affidavit with motions setting forth theories, and judgment had been on pleadings, court and parties were sufficiently advised as to grounds for motion. Howard v. Howard, 11 Utah 2d 149, 356 P.2d 275 (1960).

—Setting aside conditional order.

Where court on own initiative lowered from $2,000 to $1,000 value of building as found by jury and entered conditional order granting new trial unless plaintiff consented to reduction, court could restore jury findings under authority of this Rule, since plaintiff filed motion to set aside conditional order for new trial within ten days. National Farmers' Union Property & Cas. Co. v Thompson, 4 Utah 2d 7, 286 P.2d 249, 61 A.L.R.2d 635 (1955).

Orders.

—Correction.

Where judge made perfunctory or clerical mistake resulting from erroneous assumption that order prepared by counsel correctly reflected judgment of Supreme Court and trial court, judge could correct order on his own motion. Meagher v. Equity Oil Co., 5 Utah 2d 196, 299 P.2d 827 (1956).

Cited in Boskovich v. Utah Constr. Co., 123 Utah 387, 259 P.2d 885 (1953); Thomas v. Heirs of Braffet, 6 Utah 2d 57, 305 P.2d 507 (1956).

COLLATERAL REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d Motions, Rules, and Orders § 1 et seq.; 61A Am. Jur. 2d Pleading §§ 31 et seq., 665.

C.J.S. — 60 C.J.S. Motions and Orders § 1 et seq.; 71 C.J.S. Pleading §§ 63 to 210, 140 et seq., 211 et seq.

A.L.R. — Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113

Rule 8. General rules of pleadings.

(a) *Claims for relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) *Defenses; form of denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) *Effect of failure to deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to be concise and direct; consistency.*

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of pleadings.* All pleadings shall be so construed as to do substantial justice.

Compiler's Notes. — This rule is substantially the same as Rule 8, F.R.C.P.

Cross-References. — Amended and supplemental pleadings, U.R.C.P. 15.
Arbitration, § 78-31a-1 et seq.
Comparative negligence, § 78-27-38.
Counterclaim and cross-claim, U.R.C.P. 13.
Creditors, assignment for benefit of, § 6-1-1 et seq.
Defenses and objections, U.R.C.P. 12.
Fee for filing cross-claim or counterclaim, §§ 21-1-5, 78-6-14.
Fellow servant defined, § 34-25-2.
Form of pleadings, U.R.C.P. 10.
Forms intended to indicate simplicity and brevity of statement, U.R.C.P. 84.
Forms of answers, Forms 21, 22.
Hearing of certain defenses before trial, U.R.C.P. 12(d).
Interpleader, U.R.C.P. 22.
Motions, forms for, Forms 20, 23, 24.
Numbered paragraphs, U.R.C.P. 10(b).
One form of action, U.R.C.P. 2.
Reply to answer, order for, U.R.C.P. 7(a).
Security interest, enforceability of, § 70A-9-203.
Special forms of pleadings and writs abolished, U.R.C.P. 65B(a).
Statute of frauds, generally, § 25-5-1 et seq.
Statute of frauds, investment securities, § 70A-8-319.
Statute of frauds, sales, § 70A-2-201.
Statute of frauds, Uniform Commercial Code, personal property not otherwise covered, § 70A-1-206.
Third-party practice, U.R.C.P. 14.
Time for answer, U.R.C.P. 12(a).
Uniform Commercial Code, supplementary principles of law applicable, § 70A-1-103.

NOTES TO DECISIONS

Affirmative defenses.
—Accord and satisfaction.
——Pleading.
——Time limitation.
—Avoidance.
—Consent.
—Election of remedies.
—Estoppel.
——Failure to plead.
—Failure of consideration.
——Failure to plead.
——Pleading.
—Failure to plead.
——Affidavit opposing summary judgment.
——Denial.
——Notice and opportunity.
——Permissive amendment.
——Waiver of defense.
—Fraud.
——Necessary allegations.
—Limitation of Landowner Liability Act.
—Mitigation of damages.
——Failure to plead.
——Pleading.
—Mutual mistake.
—Statute of frauds.
——Motion to dismiss.
——Pleading.
—Statute of limitations.
——Applicability to plaintiffs.
——Pleading.
——Waiver.
—Waiver.
Claims for relief.
—Amendment of pleading.
—Attorney fees.
—Essential allegations.
——Alienation of affections.
—Request for alternative relief.
—Sufficiency of complaint.
——Attachment of exhibit.
——Found not sufficient.
——Found sufficient.
——Liberal construction.
Consistency.
—Double recovery.

ADDENDUM C
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH

DANIEL C. McKEON and LISA McKEON, PlaintiffS, vs. KENNETH CRUMP and AMY S. CRUMP, Defendant.	**ORDER** Civil No. 990404250 Honorable Fred D. Howard District Court Judge

This matter came before the above-entitled court on September 12, 2000, at 11:00 a.m. for hearing on Defendants' Motion to Dismiss, the Plaintiffs having presented their case and having rested. Plaintiffs were represented by Nelson Abbott; and Defendants were represented by Richard D. Bradford. The court, having heard argument on the Motion, being fully appraised and having fully considered this matter, and having heretofore entered its Findings of Fact and Conclusion of Law, the court hereby enters the following order.

ORDER AND JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Plaintiffs' Complaint is hereby dismissed with prejudice.

2. Defendants shall return the $2,500.00 Earnest Money to Plaintiffs as a set-off.

3. Defendants are awarded reasonable and necessary costs and reasonable attorney fees as follows:

Attorney fees through September 12, 2000	$4,908.75
Costs and disbursements	1,343.03
Less credit for Earnest Money Return	(2,500 00)
TOTAL REMAINING JUDGMENT	$3,751.78

together with after-accruing attorneys fees and costs, as may be shown.

DATED this 29th day of November, 2000.

BY THE COURT:

Honorable Fred D. Howard
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, on this 29th day of November, 2000:

Richard D. Bradford
BRADFORD & BRADY, P.C.
389 North University Avenue
Provo, UT 84601

Nelson Abbott
ABBOTT, SPENCER & SMITH, LLC
39 West 300 North
Provo, UT 84601

By _____
Deputy Clerk

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH

DANIEL C. McKEON and LISA McKEON, Plaintiff, vs. KENNETH CRUMP and AMY S. CRUMP, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 990404250 Honorable Fred D. Howard District Court Judge

This matter came before the above-entitled court on September 12, 2000, at 11:00 a.m. for hearing on Defendants' Motion to Dismiss, the Plaintiffs having presented their case and having rested. Nelson Abbott appeared on behalf of Plaintiffs, and Richard D Bradford appeared on behalf of Defendants. Plaintiff Dan McKeon and Defendant Amy Crump were also present. The court heard argument on the Motion, and being fully apprized and having fully considered this matter, the court now makes and enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is a suit for specific performance and damages under a Real Estate Purchase Contract.

2. On, or about, October 25, 1999, the parties entered into a Real Estate Purchase Contract for the sale of Plaintiffs' home to Defendants. Incident to the contract, Defendants paid Plaintiffs $2,500 00 Earnest Money.

3. Defendants never purchased Plaintiffs' home.

4. On December 2, 1999, Plaintiffs filed this lawsuit against Defendants Plaintiffs did not return the Earnest Money to Defendants prior to filing suit or pursuing any other remedy

5. On December 6, 1999, Defendants gave notice that they would not go through with the purchase and demanded return of the Earnest Money

6. On March 6, 2000, Defendants filed an answer Defendants did not raise the failure to return the Earnest Money as an affirmative defense in their answer

7. On April 18, 2000, counsel for the parties entered into a stipulation Part of the stipulation was that Defendants would waive all objections to the timeliness of the return of the Earnest Money.

8. On May 19, 2000, Plaintiffs returned the Earnest Money, twenty-five hundred dollars ($2,500), to Defendants and Defendants accepted the money

9. Plaintiffs returned the Earnest Money in an attempt to revive or preserve their claim for specific performance.

10. The Real Estate Purchase Contract contains the following provision providing for return of the Earnest Money "If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law " Paragraph 16

11. The Real Estate Purchase Contract contains the following provision providing for attorney fees "In the event of litigation or binding arbitration to enforce this contract, the

prevailing party shall be entitled to costs and reasonable attorney fees " Paragraph 17 1

12 Plaintiffs presented their case at trial on June 6, 2000, and August 29, 2000 Plaintiffs rested their case on August 29, 2000

13 At the close of Plaintiffs case, Defendants made a motion to dismiss based upon Plaintiffs' failure to return Defendants' Earnest Money before filing suit

CONCLUSIONS OF LAW

14 The Real Estate Purchase Contract required Plaintiffs to return the Earnest Money prior to filing suit

15 Plaintiffs failed to return the Earnest Money prior to filing suit

16 The failure to return the Earnest Money is an affirmative defense

17 U R C P 12 states that affirmative defenses are waived if not raised in the answer

18 Notwithstanding the affirmative defense rule, the progeny of Utah cases dealing specifically with the return of Earnest Money under similar contract cases (cited in Defendants' Memorandum in Support of Defendants' Motion to Dismiss and starting with *Andreasen*) compel this court to find that Utah law requires the return of the Earnest Money prior to filing suit and that such defense may not be waived by failing to raise it in the answer or through stipulation of the parties Therefore, the issue of whether the defense was waived, by failing to raise it in the answer or through stipulation, is moot

19 Because the defense cannot be waived, by the terms of the parties' contract, Plaintiffs have

by retaining Defendants' Earnest Money, elected their contract remedy. As such, Plaintiffs are precluded from asserting a cause of action for specific performance and damages.

20. Defendants could have raised their defense without waiting until the close of Plaintiffs' case.

21. By failing to timely raise the defense in their answer and by stipulating to waive it, Defendants unnecessarily increased the costs of suit, attorney fees and the amount of judicial resources expended in this action.

22. As set forth in its Ruling Re: Attorney Fees and Costs, the court finds that Defendants' reasonable and necessary attorney fees are $4,908.75 with costs of $1,343.03. The court finds that it is just and proper that Defendants be awarded said fees and costs.

23. In exercising its equitable powers, the court finds that Defendants are to return the $2,500.00 Earnest Money to Plaintiffs, which Plaintiffs had returned to Defendants in an attempt to revive or preserve their claim for specific performance.

DATED this 29th day of November, 2000.

BY THE COURT:

Honorable Fred D. Howard
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, on this 29th day of November, 2000:

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By _____
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